

**No. 05-18-00611-CV**

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**IN THE FIFTH COURT OF APPEALS  
DALLAS, TEXAS**

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DALLAS, TEXAS

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**PANDA POWER GENERATION INFRASTRUCTURE FUND, LLC, D/B/A/ PANDA POWER  
FUNDS, ET AL.,**  
*Appellants,*

LISA MATZ  
Clerk

**v.**

**ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.,**  
*Appellee.*

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On Appeal from the 15th Judicial District Court  
Grayson County, Texas, Cause No. CV-16-0401

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**BRIEF OF APPELLEE**

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## STATEMENT OF THE CASE

*Nature of the Case:*

Investors and project companies (collectively, Panda) sued the Electric Reliability Council of Texas, Inc., alleging fraud, breach of fiduciary duty, and negligent misrepresentation. Panda alleged that it invested \$2.2 billion in power plants, relying on ERCOT's legislatively required estimation of Texas's future demand for electricity. Panda contends that excess capacity has forced it to sell power "at a fraction of the price" it had anticipated. CR3:1158.

*Trial Court:*

Honorable James P. Fallon, 15th Judicial District Court of Grayson County, Texas.

*Course of Proceedings:*

ERCOT filed a jurisdictional plea on the ground that Panda's claims against it fall within the Public Utility Commission's exclusive jurisdiction. CR9:3016. After the trial court denied that plea, ERCOT moved for reconsideration and also sought dismissal based on ERCOT's sovereign immunity. CR13:4418. The trial court denied this plea as well.

ERCOT challenged the trial court's order through simultaneous interlocutory appeal and mandamus proceedings. The court of appeals dismissed ERCOT's interlocutory appeal on the ground that ERCOT was not a governmental unit. But it granted ERCOT mandamus relief, holding that ERCOT was entitled to sovereign immunity. The court ordered the trial court to dismiss Panda's complaint within 30 days. *ERCOT v. Panda Power Generation Infrastructure Fund, LLC* ("Panda P"), 552 S.W.3d 297 (Tex. App.—Dallas 2018, orig. proceeding). The court did not reach ERCOT's exclusive-jurisdiction argument. Panda's motion for en-banc rehearing was denied.

*Trial Court Disposition:*

Panda did not timely seek a stay of the court of appeals' mandamus order. Consequently, the trial court dismissed Panda's suit. CR17:6001. Panda perfected this appeal from that final judgment.

*Other  
proceedings:*

Although the trial court rendered a final judgment dismissing the case (which is the subject of this appeal), Panda also sought mandamus relief in the Supreme Court from the court of appeals' mandamus order. *In re Panda Power Infrastructure Fund, LLC*, No. 18-0792 (Tex. filed Aug. 24, 2018).<sup>1</sup> In response, ERCOT filed a conditional petition for review preserving the governmental-unit question. *ERCOT v. Panda Power Generation Infrastructure Fund, LLC*, No. 18-0781 (Tex. filed Sept. 24, 2018).<sup>2</sup> Panda also filed a new Travis County lawsuit against current and former ERCOT officers, which mirrored its claims in this case. The trial court granted ERCOT's jurisdictional plea and anti-SLAPP motion. Panda has also perfected an appeal from that judgment. *Panda Sherman Power Intermediate Holdings I, LLC v. Doggett*, No. 03-18-00695-CV (Tex. App.—Austin filed Oct. 24, 2018).<sup>3</sup>

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<sup>1</sup> <https://goo.gl/8UJe2F>.

<sup>2</sup> <https://goo.gl/9FcUXq>.

<sup>3</sup> <https://goo.gl/ktSQE3>.

## STATEMENT REGARDING ORAL ARGUMENT

ERCOT agrees with Panda that oral argument is not necessary to resolve this appeal because its outcome is governed by *Panda I*. ERCOT also notes that *Panda I* is currently pending before the Supreme Court of Texas. A prompt resolution of this appeal would put both proceedings, which present virtually identical issues, before the Supreme Court at the same time. And because this Court heard argument in *Panda I*, it is unlikely to benefit from another oral hearing in this case.

If the Court nevertheless determines that oral argument is appropriate, ERCOT respectfully requests the opportunity to participate.

### **ISSUES PRESENTED**

1. Does the law-of-the-case doctrine require affirmance of the trial court's judgment?
2. Did the trial court correctly dismiss Panda's suit because of ERCOT's sovereign immunity?
3. Should the trial court's judgment be affirmed because the PUC has exclusive jurisdiction over Panda's claims against ERCOT?

## STATEMENT OF FACTS

In *Panda I*, this Court held that ERCOT’s sovereign immunity barred Panda’s claims. That holding was based, in large measure, on the unique regulatory regime that has developed in Texas in the last few decades. Yet Panda’s statement of facts omits much of the detail necessary to understand ERCOT’s critical role in the oversight of the State’s electric grid—facts that this Court found important to its decision in *Panda I*.

### **I. Deregulation fundamentally changed Texas’s energy market and thrust ERCOT into a new, regulatory role.**

In 1999, the Legislature amended the Public Utility Regulatory Act, TEX. UTIL. CODE tit. 2,<sup>4</sup> to deregulate the production and sale of electricity. In the new market that followed, ERCOT was transformed from a voluntary membership organization with no binding authority to a critical component of Texas’s regulatory apparatus, charged with overseeing the State’s electric grid.

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<sup>4</sup> PURA protects “the public interest inherent in the rates and services of electric utilities” through a “comprehensive and adequate regulatory system” that assures “rates, operations, and services that are just and reasonable to the consumers and to the electric utilities.” PURA § 31.001(a). The Legislature ordered the PUC to regulate and supervise this market. *Id.* §§ 11.002(c) (conferring on PUC “authority to make and enforce rules necessary to protect” telecommunications and electric services customers consistent with the public interest), 14.001 (“The [PUC] has the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction.”), 32.001 (granting the PUC “exclusive original jurisdiction over the rates, operations and services” of designated electric utilities).

**A. Before deregulation, ERCOT was a much different entity.**

Panda imagines a direct line between ERCOT as it was founded in 1970 and ERCOT today. But no less than the market itself, ERCOT has been totally transformed by the electricity market's deregulation. Once a voluntary association with no teeth, today ERCOT exercises substantial state power, delegated to it by the Legislature and the PUC, to administer an electric market that fuels Texas's economic growth. Panda's brief suppresses this critical evolution.

Before deregulation, Texas was dominated by vertically integrated companies that generated power, transmitted it along their own lines, then sold it to their retail customers. Electric rates were set by the Public Utility Commission. To ensure adequate generation capacity, the common law recognized a "duty to serve" that required each utility to provide "adequate . . . power" to anyone within its jurisdiction that requested it. Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1251–52 (1998).<sup>5</sup>

ERCOT's predecessor was the brainchild of these companies. Before World War II, the grids owned by the vertically integrated power companies were not interconnected. *See W. Tex. Utils. Co. v. Tex. Elec. Serv. Co.*, 470 F. Supp. 798, 808–

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<sup>5</sup> Additionally, utilities were entitled to recover "not only their reasonable and prudent investments of capital" in the plants they built, "but also a reasonable, regulated return on those investments." *CenterPoint Energy, Inc. v. PUC*, 143 S.W.3d 81, 82 (Tex. 2004).

09 (N.D. Tex. 1979). During the War, these grids began to interconnect “to meet wartime imperatives.” Jared M. Fleisher, *ERCOT’s Jurisdictional Status: A Legal History and Contemporary Appraisal*, 3 TEX. J. OIL GAS & ENERGY L. 4, 10 (2008). They thus formed an unincorporated entity called the Texas Interconnected System. *Id.*

When properly coordinated and planned, interconnection allowed these separate utilities to better respond to spikes in demand—especially during emergencies—and thus enhanced each utility’s reliability. *See W. Tex. Utils.*, 470 F. Supp. at 806, 808–09.

In 1970, ERCOT was incorporated as a voluntary membership organization for these interconnected utilities. *Id.* at 808–09. Although the ERCOT of that era coordinated transactions between these interconnected grids, it had no authority to mandate membership in its interconnection, let alone to set rules its members were bound to follow. Nor was ERCOT tasked with ensuring adequate generation capacity—that was the job of the common-law duty to serve.

## **B. Deregulation transformed the market—and ERCOT.**

In 1999, the Legislature established a partially deregulated competitive market. The biggest change was the unbundling of the vertically integrated power companies into discrete generation, transmission and distribution, and retail companies. PURA § 39.051(b). Where retail rates had once been set by the PUC,

they would now be a function of a consumer's agreement with its retail electric provider. That provider would in turn buy power wholesale at market prices.

But not every part of the electric system was deregulated. The Legislature excepted "transmission and distribution services" from deregulation. It enacted a substantial body of new law to "protect the public interest during the transition to and in the establishment of a fully competitive electric power industry." *Id.* § 39.001(a).

The centerpiece of this new regulatory regime was the Legislature's command that the PUC designate an "independent organization" (also referred to as an "independent system operator"). This organization was designed to ensure:

- "access to the transmission and distribution systems for all buyers and sellers of electricity on nondiscriminatory terms";
- "the reliability and adequacy of the regional electrical network";
- "that information relating to a customer's choice of retail electric provider is conveyed in a timely manner to the persons who need that information"; and
- "that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region."

*Id.* §§ 39.151(a)–(c). By "independent," the Legislature did not mean independent *from the PUC*, but independent *from participants in the market*: The "independent organization" must be "sufficiently independent of any producer or seller of

electricity,” such that its “decisions will not be unduly influenced” by them. *Id.* § 39.151(b).

The PUC chose ERCOT to play this new regulatory role. 16 TEX. ADMIN. CODE § 25.361(a). As a result, ERCOT underwent a paradigmatic transformation of its duties, governance, and structure. Tex. Pub. Util. Comm’n, *Application of ERCOT ISO for Certification as Independent Organization, Item No. 24*, Docket No. 22061 (Feb. 2, 2001) (final order) (requiring ERCOT to make “amendments to [its] articles of incorporation and a revise[ its] membership and funding agreement.”).<sup>6</sup> In the words of the Sunset Commission, it “began serving a very different and greatly expanded role.” Sunset Advisory Commission, Staff Report, PUC of Texas, Office of Public Utility Counsel, Telecommunications Infrastructure Fund Board, Electric Utility Restructuring Legislative Oversight Committee (2004).<sup>7</sup>

### **1. The PUC exercises pervasive authority over ERCOT.**

Before deregulation, ERCOT was an entirely private, voluntary organization. But since the PUC designated it the “independent organization,” ERCOT no longer operates separately from the State, which today has plenary authority over ERCOT’s operations, budget, and finances—and, through the PUC’s authority over its bylaws—its membership and governance.

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<sup>6</sup> <https://goo.gl/w881pp>.

<sup>7</sup> <https://goo.gl/HGLuVE>.

The PUC exercises “*complete authority*” over ERCOT’s “finances, budget, and *operations*.” *Id.* § 39.151(d) (emphasis added). This allows the PUC to “ensure [ERCOT’s] accountability and” the “adequate[] perform[ance]” of ERCOT’s “functions and duties.” *Id.* ERCOT must comply with the PUC in its oversight and investigatory functions. *Id.* The PUC can require ERCOT to report on its performance and finances, which the PUC may also audit. *Id.* § 39.151(d-4).

The PUC must “adopt and enforce rules relating to the reliability of the regional electric network and accounting for the production and delivery of electricity among generators and all other market participants.” *Id.* § 39.151(d). ERCOT’s precise functions are subject to these PUC-crafted rules. *See id.*; *accord id.* § 39.151(a).

The PUC has delegated rulemaking authority to ERCOT, subject to the PUC’s continued oversight and review. *Id.* § 39.151(d). Thus, ERCOT, with PUC permission, makes and enforces “operating standards” that bind electricity market participants. *Id.* § 39.151(i). ERCOT may also “establish and oversee transaction settlement procedures.” *Id.* All market participants must obey ERCOT’s “rules, guidelines, and procedures,” or face PUC-imposed penalties and sanctions. *Id.* § 39.151(j).

The PUC is empowered to resolve complaints that “[a]ny affected entity” lodges regarding ERCOT’s operations. 16 TEX. ADMIN. CODE § 22.251(b); *see also*

PURA § 39.151(d-4)(6). The PUC may “take appropriate action” if ERCOT “does not adequately perform [its] functions or duties.” *Id.* § 39.151(d). This includes the power to punish ERCOT for inadequate performance or noncompliance with the law. *Id.* The PUC can assess administrative penalties or revoke ERCOT’s certification altogether. *Id.* §§ 39.151(d), (d-4)(5). To that end, the PUC has established procedures for ERCOT’s decertification if the PUC determines that ERCOT has committed “significant violations of PURA or [PUC] rules or fail[s] to efficiently and effectively carry out” its duties. 16 TEX. ADMIN. CODE § 25.364(d).

When evaluating ERCOT’s conduct, the PUC must consider whether assessing a penalty would impair ERCOT’s critical functions. In order “to ensure continuity of operations,” the Legislature requires the PUC to consider the “select[ion] and certif[ication]” of a successor organization, to which ERCOT’s assets will be transferred, if the PUC is contemplating ERCOT’s decertification. PURA § 39.151(d). Accordingly, the PUC forbids ERCOT’s decertification without the simultaneous designation of a successor. 16 TEX. ADMIN. CODE § 25.364(e). The PUC must order that ERCOT’s “assets and liabilities” be transferred to this successor, and this transfer must occur “in a way that ensures that the functions of the independent organization continue to be provided reliably and without interruption.” *Id.* §§ 25.364(e), (g). The need for continuity allows the PUC to order

ERCOT, its successor, or both to take the actions necessary to ensure continued operations. *Id.* § 25.364(h).

The PUC controls ERCOT's budget. PURA § 39.151(d-1). ERCOT must propose its budget to the PUC, which may “approve, disapprove, or modify *any item* included.” *Id.* (emphasis added). Likewise, ERCOT may not take on or refinance debt without the PUC's approval. *Id.* § 39.151(d-2). As part of its budget-review process, ERCOT must establish “performance measures to track [its] operations.” *Id.* § 39.151(d-3). The PUC must report to the lieutenant governor, speaker, and legislative committees regarding ERCOT's performance. *Id.* ERCOT's budget-review process is subject to a public-comment period. *Id.* § 39.151(d-1).

The PUC also controls ERCOT's revenue, which is raised through a “system administration fee.” *Id.* § 39.151(e). The PUC establishes the amount of the fee, which must be “reasonable and competitively neutral to fund [ERCOT's] approved budget.” *Id.* ERCOT collects the fee from market participants that buy electricity on behalf of consumers, who therefore are ultimately responsible for payment. Revenue raised through the fee must “closely match” the revenue needed to fund ERCOT's budget. *Id.* The fee must also “tak[e] into account the effect of [the] fee on market participants and consumers.” *Id.*

The PUC exercises substantial control over ERCOT's board. The PUC approves ERCOT's by-laws, which govern board-member selection. *Id.*

§ 39.151(g). The board’s chairman, who cannot be affiliated with any market segment, serves only with PUC consent. *Id.* §§ 39.151(g)(7), (g-1); 16 TEX. ADMIN. CODE § 25.362(g)(5). Only the PUC can remove unaffiliated ERCOT board members for cause. 16 TEX. ADMIN. CODE § 25.362(g)(5). ERCOT’s decisions to remove an unaffiliated board member—or rule on a candidate’s qualifications—are subject to PUC approval. *Id.* § 25.362(g)(4). The PUC’s chair is an ex officio member of ERCOT’s board. PURA §§ 39.151(g), (g)(1). All ERCOT board members are subject to conflict-of-interest laws, and board meetings must be open to the public. *Id.* §§ 39.1511, 39.1512.

Finally, the 82nd and 83rd Legislatures substantially increased the PUC’s and Sunset Commission’s oversight roles over ERCOT. *See* Act of May 13, 2013, 83rd Leg., ch. 170, § 1.08, 2013 Tex. Gen. Laws 725, 728–29 (codified at PURA §§ 39.151(d-1)); Act of May 29, 2011, 82nd Leg., R.S., ch. 1232, § 1.09, 2011 Tex. Gen. Laws 3278, 3279–80 (codified at PURA §§ 39.151(n)–(n-1)).

**2. In line with its elevated status, ERCOT today plays a fundamentally different role than it did before deregulation.**

To enable competition in the newly competitive generation sector, the PUC and Legislature chose an energy-only market design for the ERCOT region. This means that prices paid compensate only the energy sold at that moment; they do not include “capacity payments” that compensate generators “for building plants and keeping them in operation.” Lynne Holt, et al., *(When) to Build or Not to Build?*:

*The Role of Uncertainty in Nuclear Power Expansion*, 3 TEX. J. OIL GAS & ENERGY L. 174, 211 (2008). Under this market design, prices rise dramatically higher when the supply of energy is relatively scarce. Thus, increased generation capacity is built by private investors when they expect that future demand will be sufficiently high compared with future generation capacity.

Within the contours of this competitive market design, the Legislature tasked ERCOT with ensuring “the reliability and adequacy of the regional electric network.” PURA § 39.151(a). Consistent with the Legislature’s and PUC’s policy choices, ERCOT’s chief tool in carrying out this directive is market forces; in the deregulated market, generation adequacy is driven by competitive forces, rather than the duty to serve. *See* PURA § 39.001(a) (finding that “the production and sale of electricity” should not be regulated, and that the prices for these services “should be determined by customer choices and the normal forces of competition”).

The PUC therefore “prescribe[d] mechanisms that [ERCOT] shall establish to provide for resource adequacy in the energy-only market design.” 16 TEX. ADMIN. CODE § 25.505(a); *see* PURA § 39.151(d) (authorizing the PUC to make rules regarding electric reliability). Among these “mechanisms” for “encourag[ing] market participants to build and maintain a mix of resources that sustain adequate supply of electric service” was a requirement that ERCOT “provide[] market participants with a projection of the capability of existing and planned electric

generation resources, load resources, and transmission facilities to reliably meet ERCOT’s projected needs.” *Id.* §§ 25.505(a), (c); *see also id.* § 25.362(i)(2)(D).

The PUC thus requires ERCOT to publish forecasts as part of ERCOT’s statutory duty to ensure the adequacy and reliability of the ERCOT system.

## **II. Panda’s claims arise out of ERCOT’s regulatory role.**

The Panda Appellants are “investors and project companies” that built three power plants in Texas for \$2.2 billion. CR3:1158. They claim to have relied to their detriment on alleged misrepresentations in ERCOT’s PUC-mandated reports. *Id.*

### **A. The Capacity, Demand, and Reserve Reports**

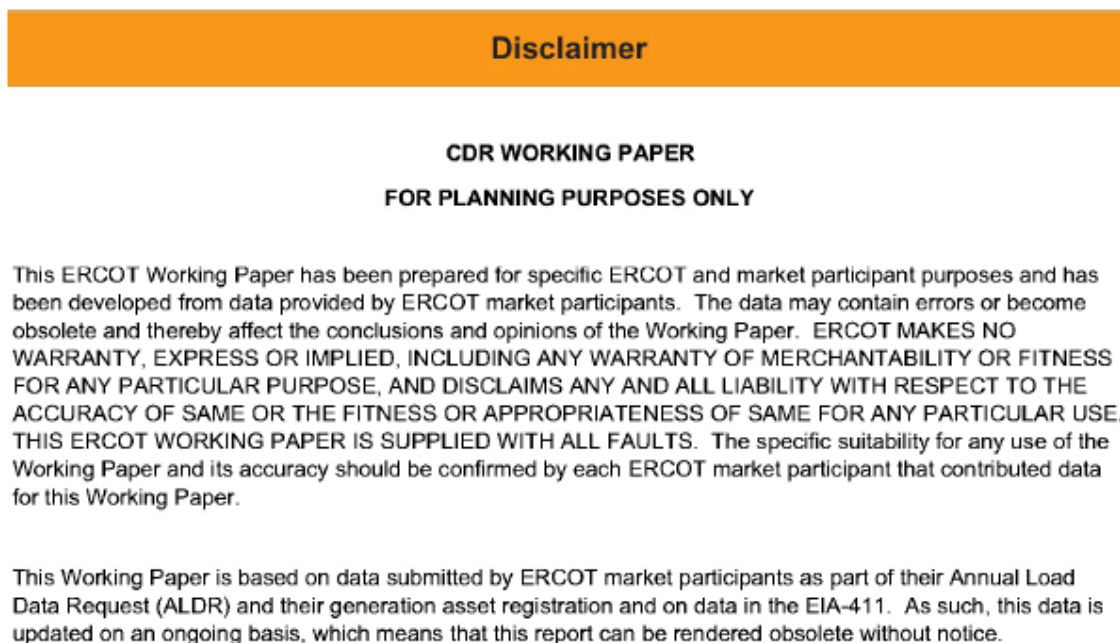
As ERCOT notes above, it must issue reports “intended to encourage market participants to build and maintain a mix of resources that sustain adequate supply of electric service.” 16 TEX. ADMIN. CODE § 25.505(a). To satisfy this responsibility, ERCOT must publish an annual “statement of opportunities” that “provides market participants with a projection of the capability of existing and planned electric generation resources, load resources, and transmission facilities.” *Id.* § 25.505(c).<sup>8</sup>

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<sup>8</sup> Panda asserts that “[l]ong before” deregulation, ERCOT “provid[ed] market reports to guide the needs of Texas’s energy market.” Panda Br. 4. Panda cites nothing for this claim, so it is unclear to what it refers. But as ERCOT explains above, before deregulation grid adequacy was not determined by market forces. ERCOT’s forecasting efforts are a PUC-mandated consequence of the deregulated electricity market.

Similarly, the PUC requires ERCOT to submit an annual “operations report and plan” that discusses the state of the electric grid, including ERCOT’s most recent information “on capacity, demand and reserves.” *Id.* §§ 25.362(i)(2)(D), (I).<sup>9</sup>

The principal way ERCOT meets these responsibilities is by publishing biannual Capacity, Demand, and Reserve reports, or CDRs. The CDRs provide a ten-year prediction of the ERCOT region’s capacity, demand, and reserve margin. *See, e.g.*, CR9:3076. The second page of each CDR includes an explicit disclaimer:



*See, e.g.*, CR9:3072.

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<sup>9</sup> Likewise, this report must identify “the need for additional transmission, generation or demand response resources within the ERCOT region.” 16 TEX. ADMIN. CODE § 25.362(i)(2)(I). This must “include projections of changes in demand [and] the capability of generation.” *Id.*

## **B. Panda's Allegations**

Panda knew the CDRs' "data may contain errors or become obsolete." *Id.* Panda nevertheless complains that ERCOT's 2011 CDR inaccurately "projected serious and long-term scarcity of power supply," a projection that continued into ERCOT's 2012 CDR. CR3:1168. It says ERCOT "knew" that these projections "would lure investors to construct plants." *Id.*

Ignoring the CDRs' disclaimers, Panda alleges that the 2011 and 2012 CDRs induced it to "ma[ke] investments [it] believed were critical for reliable power generation for Texas." CR3:1169. After their plants were under construction, Panda alleges that "ERCOT published new CDRs using different data and a different methodology." *Id.* These new reports purportedly showed "extreme over capacity" rather than the "extreme scarcity" shown by the previous reports. *Id.* Panda asserts that:

Information slowly surfaced showing that ERCOT's methodology and data points used in the 2011 and 2012 CDRs were either seriously flawed or rigged. Questions began to surface as to whether ERCOT knew about the defective forecasting but suppressed this fact to induce construction of plants without capacity payments. Questions arose concerning ERCOT's competency and independence, and whether the science underlying the CDRs was so unsound as to be wholly unreliable.

CR3:1170.<sup>10</sup>

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<sup>10</sup> In a "capacity market," "an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself. To maintain the reliability of the grid, electricity providers generally purchase more capacity, *i.e.*, rights to acquire energy, than necessary

Panda sued ERCOT for fraud, negligent misrepresentation, breach of a “formal fiduciary relationship [which] arose by virtue of the statutory and common law duties owed by ERCOT to members and market participants,” and breach of “an informal fiduciary duty [that] arose under the facts of this investment.”<sup>11</sup> CR3:1171. It sought \$2.7 billion or more in damages.<sup>12</sup> CR14:4972–73.

### **III. Procedural History**

ERCOT filed a plea arguing that Panda’s claims were within the PUC’s exclusive jurisdiction. After the trial court denied that plea, ERCOT renewed it and invoked sovereign immunity from Panda’s suit. The trial court denied that plea as well.

Because of jurisprudential uncertainty over whether ERCOT was a governmental unit entitled to an interlocutory appeal, ERCOT filed a simultaneous interlocutory appeal and mandamus proceeding challenging the trial court’s order, which this Court consolidated.

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to meet their customers’ anticipated demand.” *NRG Power Mktg., LLC v. Me. Pub. Util. Comm’n*, 558 U.S. 165, 168–69 (2010); *see also* CR3:1166. The Legislature and PUC have so far elected not to implement a capacity market in Texas, instead relying on the market price to ensure sufficient capacity.

<sup>11</sup> Panda nonsuited all of its other claims. CR15:5286.

<sup>12</sup> Panda asserts damages representing: (1) the difference between invested dollars and current valuation of equity; (2) the difference between gross amount of equity and current valuation of equity; (3) the difference between the total project cost and the most recent appraised value of the project; and (4) quarterly losses, which were \$350,000 in the first quarter of 2017 and which will continue “for every other quarter going forward until the sale date.” CR14:4972–73.

After oral argument, the Court ruled that ERCOT was not a governmental unit, and therefore dismissed ERCOT's interlocutory appeal. But the Court provisionally granted mandamus relief, concluding that ERCOT was entitled to sovereign immunity. The Court thus ordered the trial court to dismiss Panda's claims within 30 days. *See ERCOT v. Panda Power Generation Infrastructure Fund, LLC* ("*Panda I*"), 552 S.W.3d 297 (Tex. App.—Dallas 2018, orig. proceeding).

ERCOT immediately consented to Panda's stated intent to seek a stay of the mandamus order while Panda pursued review in the Supreme Court. But Panda delayed asking this Court to stay its order. As a result, the trial court rendered a final judgment dismissing Panda's claims. CR17:6001. This Court denied Panda's emergency motion asking this Court to, in effect, reverse a judgment that this Court just ordered it to sign. This court also denied Panda's subsequent motion for rehearing en banc. Panda then perfected this appeal from the trial court's judgment.

Meanwhile, several other appellate proceedings are in progress. Despite the trial court's appealable final judgment, Panda challenged *Panda I* in a mandamus petition filed in the Supreme Court of Texas. In response, ERCOT filed a conditional petition for review to preserve its right to relief if the Supreme Court should that Court decide ERCOT is a governmental unit.

Panda also filed a new lawsuit in Travis County asserting identical claims against current and former ERCOT officers. The trial court granted ERCOT's plea

to the jurisdiction and motion to dismiss under the Texas Citizen's Participation Act and dismissed Panda's claims. Panda has also appealed from that judgment.

## SUMMARY OF THE ARGUMENT

Today, four separate appellate proceedings have arisen out of Panda's dispute with ERCOT—and that's not counting this Court's prior decision in *Panda I*. After *Panda I*:

- Panda sought mandamus relief in the Supreme Court;
- Panda tried to evade *Panda I* by filing a new lawsuit against ERCOT's officers in Travis County, the dismissal of which Panda is appealing;
- Panda filed this direct appeal from the trial court's judgment complying with this Court's mandamus order; and
- ERCOT, to preserve its rights, filed a petition for review in the Supreme Court conditioned on Panda's mandamus proceeding.

Beyond the procedural complexity, this dispute presents difficult legal questions. In *Panda I*, after extensive briefing and oral argument, this Court issued an exhaustive opinion resolving most of those issues. Panda's brief asks this Court to discard that work and start over.

There is no reason to do so. *Panda I* is the binding law of the case. Further, Panda raises only a handful of arguments against *Panda I*'s immunity holding. Each is rooted in false premises and none is persuasive. This Court did not adopt a new-fangled federal immunity, as Panda charges. To the contrary, this Court embraced the Texas Supreme Court's nature-and-purposes test, correctly referring to federal caselaw as persuasive authority.

Neither is remand warranted. Remand can be appropriate where a plaintiff pleads insufficient facts to show a court's jurisdiction. But that's not what happened here. Panda carefully and intentionally pleaded that ERCOT's purpose in publishing its CDRs, and its officers' statements about their findings, was to spur investment in generation capacity. This is the very purpose for which the PUC compels ERCOT to publish these reports. Because these reports are an important piece of ERCOT's regulatory function, ERCOT is immune. Panda could not plead around this immunity except by altering the very basis for its claims. Furthermore, what Panda attempts to cast as factual deficiencies requiring repleading are, in reality, legal arguments that Panda raised, and this Court rejected, in *Panda I*.

Finally, Panda's arguments brush past perhaps the largest impediment to relief: ERCOT's alternative argument that Panda's claims are within the PUC's exclusive jurisdiction. This result is demanded by Supreme Court precedents holding that PURA is a comprehensive regulatory scheme over which the PUC has exclusive jurisdiction, as well as the specific statutory provisions giving the PUC plenary authority over ERCOT's budget, finances, operations, and discipline. Damages claims therefore could not be brought against ERCOT without interfering with the PUC's oversight of the electric regulatory system. The *Panda I* court did not reach this issue because its immunity holding made the question immaterial. 552 S.W.3d at 301 ("We need not reach ERCOT's issue respecting its plea to the jurisdiction

based on exclusive jurisdiction.”). Yet this argument provides another basis for affirmance.

This Court should adhere to *Panda I* and affirm the trial court’s judgment or, alternatively, affirm on the ground of exclusive jurisdiction.

## ARGUMENT

### **I. The trial court’s judgment should be affirmed pursuant to the law-of-the-case doctrine.**

#### **A. The law-of-the-case doctrine governs.**

This court should affirm the trial court’s judgment pursuant to the law-of-the-case doctrine, under which “a decision rendered in a former appeal of a case is generally binding in a later appeal of the same case.” *Paradigm Oil, Inc. v. Retamco Oper’g, Inc.*, 372 S.W.3d 177, 182 (Tex. 2012); accord *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003) (“Under the law of the case doctrine, a court of appeals is ordinarily bound by its initial decision if there is a subsequent appeal in the same case.”). The doctrine frees this Court from any “obligat[ion] to reconsider [a] matter in subsequent appeals” that it has decided in a prior appeal. *Paradigm Oil*, 372 S.W.3d at 182.

Notably, the doctrine applies even where the initial determination was in a mandamus proceeding. In *BSP Mktg., Inc. v. Standard Waste Sys., Ltd.*, this Court held that the law-of-the-case rule is “applicable to an original proceeding that reached the merits.” No. 05-03-00518-CV, 2004 WL 119235, at \*1 (Tex. App.—Dallas Jan. 27, 2004, no pet.). In such a case, “the merits determination made in the prior original proceeding is the law of th[e] case.” *Id.* at \*2; accord *In re United Servs. Auto. Ass’n*, 521 S.W.3d 920, 927–28 (Tex. App.—Houston [1st Dist.] 2017,

no pet.) (“If the appellate court resolves a question of law in a mandamus proceeding, that merits determination is the law of the case.” (following *BSP Mktg.*)).

Here, as Panda acknowledges, the trial court dismissed Panda’s claims because it was ordered to do so by this Court’s decision in *Panda I*. Consequently, Panda concedes that its appeal raises precisely the same issues as did *Panda I*. Accordingly, *Panda I*’s holding that ERCOT has sovereign immunity, and that Panda’s claims must therefore be dismissed, “became the law of the case for future proceedings in th[is] court[.]” *Paradigm Oil*, 372 S.W.3d at 182. This doctrine is reinforced here by this Court’s rejection of Panda’s motion for en-banc rehearing.

This Court should follow the law-of-the-case doctrine and affirm the trial court’s judgment. *BSP Mktg.*, 2004 WL 119235, at \*2.<sup>13</sup>

**B. *Panda I* was correctly decided.**

Panda asks this Court to ignore the law-of-the-case doctrine and reverse the trial court’s judgment in spite of *Panda I*. An appellate court’s prior decision on an issue should only be revisited in a subsequent appeal if the “first decision was clearly

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<sup>13</sup> If this appeal is decided by a panel different than that which decided *Panda I*, it would additionally be bound to follow that decision as a result of horizontal stare decisis. *MobileVision Imaging Servs., LLC v. LifeCare Hosps. of N. Tex., L.P.*, 260 S.W.3d 561, 565 (Tex. App.—Dallas 2008, no pet.) (“We may not overrule a prior panel decision of this Court absent an intervening change in the law by the legislature, a higher court, or this Court sitting en banc.”); accord *United States v. Philip Morris USA Inc.*, 801 F.3d 250, 280 (D.C. Cir. 2015) (holding that when a subsequent appeal in a case is heard by a new panel, “an even stronger than usual version of the law-of-the-case doctrine, the law of the *circuit*, governs” (emphasis added; internal quotation marks omitted)).

erroneous.” *Briscoe*, 102 S.W.3d at 717; accord *BSP Mktg.*, 2004 WL 119235, at \*2 (applying doctrine where appellant failed to show prior decision “was clearly erroneous”).

Panda cannot meet this burden—indeed, Panda’s brief barely discusses *Panda I*’s merits.<sup>14</sup> It is unable to show that *Panda I* was wrongly decided, let alone that it was “clearly erroneous.”

**1. *Brown & Gay*’s contractor analysis does not govern this case.**

*Brown & Gay* concerned the circumstances in which a governmental contractor may benefit from the State’s immunity: the Court used the word “contractor” *forty-five* times in the course of its analysis, titling its main analytical section “Sovereign Immunity and *Private Contractors*.” *Brown & Gay Eng’g, Inc. v. Olivares*, 461 S.W.3d 117, 123 (Tex. 2015) (emphasis added). Thus, this Court correctly noted in *Panda I* that *Brown & Gay*’s “analysis and rationale . . . are based primarily on the specific context of government contracting.” 552 S.W.3d at 313. But, this Court explained, ERCOT is not a government contractor. *Id.* at 314. Panda has not offered any reason why, despite the narrow scope of its analysis, *Brown & Gay*’s contractor analysis governs a non-contractor like ERCOT. *See Panda I*, 552

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<sup>14</sup> Panda’s brief includes only a cursory discussion of why it believes *Panda I* was clearly erroneous, instead “incorporat[ing] by reference the arguments raised in its Supreme Court petition—and any future Supreme Court briefing.” Panda Br. 10. Below, ERCOT responds to the handful of points Panda’s brief actually makes. Like Panda, it also incorporates by reference its *Panda I* and Supreme Court briefing.

S.W.3d at 314 (holding that, unlike a private contractor, ERCOT is “an entity that exclusively performs functions assigned by the legislature and the PUC”). Rather than attempt to force *Brown & Gay*’s contractor analysis to fit an unintended situation, this Court correctly started with first principles, asking whether “the ‘nature and purposes’ of sovereign immunity” supported ERCOT’s arguments. *Id.* at 314 (citing *Univ. of Incarnate Word v. Redus*, 518 S.W.3d 905, 911 (Tex. 2017)). As ERCOT explains below, that analysis compelled *Panda I*’s result.

## **2. The fiscal justifications for immunity apply to ERCOT.**

ERCOT is funded by a system administration fee that “is authorized by statute, set by the PUC, collected pursuant to the State’s power, and intended to further a function for the benefit of the public.” *Id.* at 315. This Court therefore held that this case “present[s] fiscal implications pertinent to the sovereign immunity analysis,” namely the possibility that the regulatory fee would be repurposed to serve Panda’s private interests. *Id.* Panda’s argument that the fiscal justifications of immunity are inapplicable ignores this holding. Instead, Panda insists that the fiscal justifications apply only to *tax* revenue, which ERCOT does not receive. But Panda cannot justify a theory of immunity that would put State money raised by means other than the taxation power beyond the scope of its protection.

**3. In *Panda I*, the federal SRO-immunity cases were persuasive, but not dispositive.**

Panda reserves its most vociferous attacks on this Court’s decision for its discussion of federal cases recognizing immunity for ERCOT-like self-regulatory organizations. Panda insists that this Court should not have looked to those decisions because their theoretical justifications cannot be perfectly mapped onto Texas law. Panda’s Br. 11–12. But Panda’s criticisms miss the mark. As this Court correctly held, sovereign immunity’s scope depends foremost on whether its “nature and purposes” fit a particular situation. 552 S.W.3d at 314. Before looking at the SRO cases, this Court correctly performed the nature-and-purposes analysis and held that it justified an extension of immunity to ERCOT. *Id.* at 315 (“Therefore, extending sovereign immunity to ERCOT in this case would serve that doctrine’s nature and purposes.”). Only then did this Court look to the federal cases as a persuasive line of authority bolstering its core analysis. *Id.* (“*Additionally*, the extension of sovereign immunity in this case is consistent with the underlying principles and reasoning of federal cases involving SROs.” (emphasis added)). And, as this Court held, federal courts’ recognition that organizations like ERCOT are immune is persuasive even if there are doctrinal differences in the bases for that immunity. *Id.* at 317 (“Regardless of whether absolute immunity developed from the same doctrinal roots underlying official and qualified immunity, the Second Circuit’s application of SRO immunity

in *Barbara* described one of the same purposes considered by Texas courts in determining sovereign immunity.”).<sup>15</sup>

#### **4. Limitations on immunity are a concern for the Legislature.**

Relying on *LTTS*, Panda argues that ERCOT cannot have immunity because “it would seem odd for” ERCOT to have the benefit of the State’s immunity without the limitations on that immunity included in the Tort Claims Act. Panda Br. 12 (quoting *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 87–88 n.44 (Tex. 2011)). But the Supreme Court rejects the idea that a court can reason backwards from a legislative waiver to determine the scope of common-law sovereign immunity. Because the *judiciary* alone determines whether immunity exists, statutory waivers have no place in the analysis.<sup>16</sup> See *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 432–33 (Tex. 2016). In any event, ERCOT

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<sup>15</sup> Finally, Panda’s suggestion that these cases wouldn’t apply because ERCOT’s forecasts “did not regulate anyone” is not even supported by the authority it cites. Panda Br. 12 (citing *City of Providence v. Bats Global Mkts., Inc.*, 878 F.3d 36, 46–48 (2d Cir. 2017)). *Bats* did not hold that an SRO is immune only for actions that directly regulate someone; it held that an SRO is immune when it “is fulfilling its regulatory role.” 878 F.3d at 46. Here, ERCOT published its forecasts as part of its regulatory role, which was to ensure adequacy of Texas’s electric grid. *Panda I*, 552 S.W.3d at 319; see 16 TEX. ADMIN. CODE §§ 25.362(i)(2)(D), (I); 25.505(a), (c).

<sup>16</sup> It is for this reason that Panda’s reliance on *LTTS* is misleading. When discussing the potential incongruence in recognizing the charter school’s immunity but not its governmental-unit status, the Court *was not* discussing sovereign immunity. Instead, the Court was discussing *a statute* that arguably granted the charter school immunity. See 342 S.W.3d at 87–88 n.44. The Court thus thought it would be odd *for the Legislature* to grant the school immunity without also making it subject to the Tort Claims Act’s waivers. *Id.* Here, no legislative immunity is at issue, so neither are questions of legislative intent.

intends to argue in the Supreme Court that it *is* a governmental unit.<sup>17</sup> If it is right, any waivers of immunity applicable to state agencies would likewise apply to ERCOT.

**5. Assessing crippling damages against ERCOT would threaten the electric-regulatory system, not strengthen it.**

Panda contends that if ERCOT is immune from suit, investment will be discouraged, harming the competitive electricity market. Panda Br. 12–13. History does not bear out Panda’s dire predictions. This is the first suit of its type ever filed against ERCOT—indeed, as far as ERCOT can tell, it is the first against any independent system operator in the United States. The market has functioned well for nearly 20 years without imposing enormous monetary liability on ERCOT. It is the imposition of billions in dollars of damages that would harm Texas’s considered regulatory apparatus.

Panda seeks at least \$2 billion—nearly ten times ERCOT’s annual budget. Imposing such a substantial judgment would “necessitate a potentially disruptive diversion of ERCOT’s resources or a decertification of ERCOT not otherwise intended by the PUC.” *Panda I*, 552 S.W.3d at 315. The Legislature gave the PUC plenary authority over ERCOT’s budget, finances, and operations. It is within the

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<sup>17</sup> Likewise, in the Travis County suit Panda filed to avoid this Court’s immunity holding, ERCOT’s current and former officers are arguing that ERCOT is a governmental unit.

regulatory apparatus, via this broad oversight authority, that ERCOT’s “providing accurate information” should be ensured. Panda’s Br. 12.<sup>18</sup>

**C. Panda is not entitled to remand.**

Panda argues that this case should be remanded to the trial court so it can amend its pleadings to evade ERCOT’s sovereign immunity. Panda first raised this argument in its rehearing motion in *Panda I*. This Court properly rejected that argument when it denied Panda’s motion.

“[W]hen a pleading cannot be cured of its jurisdictional defect, a plaintiff is not entitled to amend.” Panda’s attempt to evade this rule falters because it misunderstands the basis for this Court’s immunity holding. Panda asserts that this Court “changed Texas law” by adopting “a uniquely-federal analysis” that requires “the existence of some ‘regulatory’ function.” Panda Br. 14. But as ERCOT has explained, this Court relied first on the Texas Supreme Court’s traditional nature-and-purposes analysis. 552 S.W.3d at 314–15. That analysis did not depend on ERCOT performing a regulatory function.

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<sup>18</sup> Panda asserts that the PUC has “declined to free ERCOT from all liability.” Panda Br. 12. It cites a PUC rule permitting ERCOT to interrupt “transmission service for the purpose of maintaining ERCOT system stability and safety.” 16 TEX. ADMIN CODE § 25.200(d). The Rule states that when ERCOT performs this function, it “shall not be liable for its ordinary negligence but may be liable for its gross negligence.” *Id.* This rule says nothing about ERCOT’s sovereign immunity. Because the PUC has no power to waive or grant immunity from suit, this administrative rule must be read as only addressing ERCOT’s potential liability *before the PUC*. As ERCOT explains below, it has always acknowledged that it is subject to proceedings before the PUC.

But even if ERCOT’s immunity did hinge on its performing a regulatory function, Panda would still not be entitled to amend. Amendment is appropriate where a pleading does “not contain sufficient facts to affirmatively demonstrate[] the trial court’s jurisdiction,” but neither does it “demonstrate incurable defects.” *Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). This is not a case where the facts are insufficient. Rather, Panda specifically pleaded that ERCOT’s demand forecasts were intended to spur investment in generation assets. *E.g.*, CR3:1167 (“Thus in an energy-only market like ERCOT, the CDRs or similar reports form the basis of investment analysis and drive the investment.”); CR3:1169 (“ERCOT specifically intended to induce investments . . .”). As this Court correctly held, ERCOT, as part of its regulatory mission to ensure the adequacy of Texas’s grid, is required to make these forecasts for this very purpose. 552 S.W.3d at 319; 16 TEX. ADMIN. CODE §§ 25.362(i)(2); 25.505(a), (c). Indeed, this Court recognized that ERCOT “*exclusively* performs functions assigned by the legislature and the PUC.” 552 S.W.3d at 314. Because Panda specifically pleaded that it sued ERCOT for actions within its regulatory function—which, this Court held, is all ERCOT does—Panda’s pleadings demonstrate an incurable defect.

Panda’s other arguments are even less compelling:

- Misconstruing non-record testimony in which ERCOT’s former CEO supposedly testified “that promoting investment is beyond ERCOT’s responsibilities,” Panda argues that it could plead that “ERCOT’s actions were outside the scope of its statutory authority.” Panda Br. 15. This

argument fails because, as ERCOT explains above, Panda carefully pleaded that ERCOT's intent in publishing its CDRs matched the purpose the PUC ascribes to ERCOT's reporting. PURA and PUC rules, not ERCOT's ex-CEO's testimony, determine the scope of ERCOT's responsibilities.<sup>19</sup> This Court correctly resolved this *legal* question in *Panda I*.

- Panda argues that it should be able to plead that “PUC rules”<sup>20</sup> and unspecified “other conduct” waive ERCOT's immunity. Of course, an administrative rule cannot waive sovereign immunity. Nor, with limited exceptions not applicable here, can an immune entity's conduct. Rather, only the Legislature can waive immunity, and it has not done so with respect to ERCOT. Finally, Panda raised these legal—not factual—questions in its *Panda I* briefing.
- Panda argues that because this Court “adopt[ed] the absolute-immunity doctrine” it should be able to “allege that” insufficient “safeguards exist under Texas law to protect against ERCOT's improper acts.” Panda Br. 16. This argument rests on the false assumption that this Court adopted an “absolute-immunity doctrine.” Further, Panda made these exact arguments in *Panda I*, asserting that damage suits were necessary to protect the electricity market. *See* Panda's Consol. Br. 42, *Panda I*, No. 05-17-00872-CV (Tex. App.—Dallas filed Sept. 20, 2017). These legal and policy questions can be—indeed, were—decided based on an evaluation of the extensive oversight mechanisms the Legislature imposed on ERCOT.

Finally, remand would be inappropriate before this Court has evaluated ERCOT's alternative ground for dismissal, which provides an independent basis for

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<sup>19</sup> In any event, Panda's account of Trip Doggett's testimony is misleading. He did not deny that the purpose of ERCOT's CDRs was to guide investment decisions; he denied that ERCOT had a role in recruiting developers.

<sup>20</sup> The only rule Panda cites is Rule 25.200(d). Panda Br. 16. Not only does this Rule speak solely to administrative claims, *supra* note 18, it applies *only* in the context of ERCOT interrupting transmission service to maintain grid stability. That circumstance is not presented here. Thus, even if Rule 25.200(d) somehow waived ERCOT's sovereign immunity that waiver would not apply here.

affirmance. In addition to sovereign immunity, ERCOT argued in the trial court and in *Panda I* that the PUC had exclusive jurisdiction. Panda’s opening brief does not address exclusive jurisdiction, but before any remand, this Court would have to first conclude that the PUC *does not* have exclusive jurisdiction over Panda’s claims. *See infra* § II.

**II. Alternatively, this Court should affirm the trial court’s judgment because Panda’s claims are within the PUC’s exclusive jurisdiction.<sup>21</sup>**

**A. Exclusive jurisdiction turns on substance, not pleading.**

“An agency has exclusive jurisdiction when a pervasive regulatory scheme indicates that [the Legislature] intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.” *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002) (quotations omitted); *see also Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 544 (Tex. 2016). Where an agency has exclusive jurisdiction, it has “authority to resolve disputes that arise within the agency’s regulatory arena.” *Marquez*, 487 S.W.3d at 544.

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<sup>21</sup> Panda asserts that “the trial court’s denial of ERCOT’s plea to the jurisdiction on [exclusive-jurisdiction grounds] remains unaffected” by the trial court’s dismissal of its claims. Panda Br. 6. Even so, Panda’s decision not to brief exclusive jurisdiction is curious. Because exclusive jurisdiction is an alternative ground for affirming the trial court’s judgment of dismissal, ERCOT had no error-preservation obligation. *City of Austin v. Whittington*, 384 S.W.3d 766, 789 (Tex. 2012). Further, jurisdictional arguments may be raised for the first time on appeal. *Henry v. Cox*, 520 S.W.3d 28, 35 (Tex. 2017).

In many cases, exclusive jurisdiction requires a litigant to “exhaust its administrative remedies before seeking recourse through judicial review.” *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013). But exclusive jurisdiction can also entirely displace a common-law claim. This displacement requires a showing that the “statute’s ‘express terms or necessary implications’ . . . indicate clearly the Legislature’s intent to abrogate common-law rights.” *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 518 S.W.3d 422, 428 (Tex. 2017) (quoting *Cash Am. Int’l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000)).

In determining whether an agency has exclusive jurisdiction, a court must look past “the way the [plaintiffs] pleaded their causes of action” and focus on the “nature of the claims.” *Marquez*, 487 S.W.3d at 547. It must ask whether “the problem” underlying the plaintiffs’ action is one over which the Legislature intended an agency to have exclusive jurisdiction. *Subaru*, 84 S.W.3d at 221; *see also Marquez*, 487 S.W.3d at 547.

**B. A pervasive regulatory scheme governs “the problem” at the heart of Panda’s claims.**

Exclusive jurisdiction does not exist as a function of magic words. Rather, a court looks to the agency’s “authorizing legislation for an express grant of exclusive jurisdiction *or* for ‘a pervasive regulatory scheme’ indicating that was the Legislature’s intention.” *Emps. Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 908–09 (Tex. 2009) (quoting *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 625 (Tex. 2007))

(emphasis added); *see also Thomas v. Long*, 207 S.W.3d 334, 341 (Tex. 2006) (finding exclusive jurisdiction even though the statute “d[id] not contain the words ‘exclusive jurisdiction’”).

“The problem” at issue in this case is the adequacy of ERCOT’s performance of its statutory and PUC-mandated duties, namely to publish reports furthering the adequacy and reliability of the electric grid.<sup>22</sup> The Supreme Court has twice held that PURA constitutes a pervasive regulatory scheme governing utility issues. And embedded within this larger pervasive scheme is a more particularized scheme governing ERCOT specifically. Whether looked at alone or as part of the larger regulatory ecosystem, a pervasive regulatory scheme governs “the problem” here at issue.

**1. The PUC has exclusive jurisdiction over lawsuits arising under PURA.**

The Supreme Court of Texas has concluded that PURA created a pervasive regulatory scheme. *Sw. Bell*, 235 S.W.3d at 625 (“PURA is intended to serve as a pervasive regulatory scheme that governs the Texas Universal Service Fund.”); *In re Entergy Corp.*, 142 S.W.3d 316, 323 (Tex. 2004) (“PURA is intended to serve as a ‘pervasive regulatory scheme’ of the kind contemplated in [*Subaru*].”).

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<sup>22</sup> In *Panda I*, Panda’s arguments missed the mark because they focused foremost on the availability of its desired remedy, rather than the substantive problem addressed by the Legislature’s regulations.

In both decisions, the Court relied on language granting the PUC exclusive original jurisdiction over certain matters, but in neither case was that language key to the Court’s finding that PURA was *pervasive*.

**a. *In re Entergy Corporation***

*Entergy* arose out of a merger between two electric utilities that predated the electricity market’s deregulation. *See* 142 S.W.3d at 319. The PUC-approved merger agreement determined how savings would be divided between ratepayers and shareholders over a multi-year period. *See id.* During that time, the market was deregulated and electricity rates were frozen. *See id.* at 320. The PUC approved a settlement agreement that allowed the utility to freeze rates and postpone retail competition. *See id.* A group of ratepayers sued, claiming that this arrangement breached the merger agreement. *See id.*

The Supreme Court looked first at whether the problem the ratepayers’ suit addressed—interpretation of and compliance with a PUC-approved contract—was subject to a pervasive regulatory scheme. *Id.* at 322. In concluding that it was, the Court pointed not to PURA’s explicit grant of exclusive jurisdiction over certain disputes, but to PURA’s statement of legislative purpose. *Id.* The Legislature’s “purpose” was to “establish a *comprehensive and adequate regulatory system* for electric utilities to assure rates, operations, and services that are just and reasonable

to the consumers and to the electric utilities.” PURA § 31.001(a) (emphasis added).

The Court explained that

the statutory description of PURA as ‘comprehensive’ demonstrates the Legislature’s belief that PURA would comprehend *all or virtually all pertinent considerations involving electric utilities operating in Texas*. That is, PURA is intended to serve as a “pervasive regulatory scheme” of the kind contemplated in [*Subaru*].

*Entergy*, 142 S.W.3d at 323 (emphasis added); *see also id.* (“The Legislature’s description of PURA as ‘*comprehensive*,’ coupled with the fact that PURA regulates even the particulars of a utility’s operations and accounting, demonstrates the statute’s *pervasiveness*.” (emphasis added)).

The Court cited the “exclusive original jurisdiction” provision not as evidence of pervasiveness, but as an indication of which entity enjoyed exclusive jurisdiction. After determining that PURA was a “pervasive” scheme, it turned to the Legislature’s grant of exclusive original jurisdiction over rate issues. *Id.* The Court held that this provision “ma[de] it clear that the Legislature intended this dispute” “to begin its journey towards resolution at the PUC.” (emphasis added)); *accord Duenez*, 288 S.W.3d at 909 (holding that there must be *either* express language *or* a pervasive regulatory scheme).

The exclusive-jurisdiction provision confirmed that the PUC held that role. *Entergy*, 142 S.W.3d at 323. Rejecting the plaintiffs’ arguments that the case presented a mere contract dispute, the Court held that the merger agreement “took

on an administrative character” when the PUC approved and adopted it. *Id.* at 323–24. It was the administrative process that gave the agreement meaning. Therefore, disputes about the agreement were within the PUC’s exclusive jurisdiction. *Id.* at 324.

**b. *In re Southwestern Bell***

*Southwestern Bell* confirms the Supreme Court’s holding that PURA created a single, overarching regulatory regime under the PUC’s purview. In that customer class action suit against Southwestern Bell, the customers alleged that Southwestern Bell violated a statutory rate cap by collecting the Texas Universal Service Fund from them. They sued for a refund and a declaration that the surcharge was illegal. 235 S.W.3d at 623. Southwestern Bell asserted that the PUC had exclusive jurisdiction over the claims. The Supreme Court agreed.

The Court observed that the Fund was created to advance what had “long been a policy objective of our state and national governments”: universal access to telecommunications service. *Id.* at 621–22. The Legislature directed the PUC to establish rules governing the assessment of the surcharge by telecommunications utilities against their customers. *See id.* at 622–23. The Supreme Court cited *Entergy*, holding that the “same reasoning applie[d].” *Id.* at 625 (“We recently held that PURA is intended to serve as a pervasive regulatory scheme of the kind contemplated in [*Subaru*].” (quotations omitted)). It noted that the Legislature had

granted the PUC “exclusive original jurisdiction over the business of property of a telecommunications utility.” PURA § 52.002(a), *quoted in Sw. Bell*, 235 S.W.3d at 625.

That grant of exclusive original jurisdiction did not specifically mention the PUC’s jurisdiction over disputes regarding the Fund. But the Court held that PURA chapter 56—which governs the Fund—“constitutes a comprehensive regulatory scheme for a [Fund] administered by the PUC.” *Sw. Bell*, 235 S.W.3d at 625. PURA, the Court thus held, was “intended to serve as a pervasive regulatory scheme that governs the [Fund].” And the Court held that the PUC had exclusive jurisdiction over this scheme because the PUC, “as administrator of the [Fund],” had “comprehensive” authority over the Fund and disputes regarding it. *Id.* at 625–26.

**2. This case arises out of two embedded “pervasive regulatory schemes.”**

ERCOT operates under the same “pervasive regulatory scheme” that the Court considered in *Entergy* and *Southwestern Bell*. The statement of purpose the Court cited in *Entergy* applies to all of PURA’s subtitle B, governing electric utilities. *See* PURA § 31.001(a). The PURA section defining ERCOT’s role and responsibilities, and the PUC’s oversight role, is part of that same subtitle. *See id.* § 39.151. Thus ERCOT is enmeshed in the “comprehensive” regulatory system governing electric utilities. Indeed, it forms a crucial piece of that system—one the legislature called “essential”—by, among other things, ensuring that power is

adequately and reliably transmitted from generators to consumers. *See FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 61 (Tex. 2014) (recognizing that ERCOT is responsible for “managing the transmission of electricity through an interconnected network—or grid—of transmission lines”). ERCOT performs that role by issuing rules and adopting operating standards that bind market participants, violations of which can result in administrative penalties and other discipline. PURA §§ 39.151(d), (i), (j).

Additionally, the comprehensive nature of PURA section 39.151, which created the position ERCOT holds, demonstrates that it is, *itself*, a pervasive regulatory scheme regarding ERCOT, embedded within the larger scheme governing the entire industry. Section 39.151 creates the role of independent system operator; empowers the PUC to certify an entity to that role; defines its structure, responsibilities, and powers; provides its funding mechanism; and vests in the PUC expansive oversight powers over the operator’s budget and operations, including the power to compel reports and discipline or decertify the organization.

These pervasive regimes cover the specific subjects underlying Panda’s suit. Panda’s claims arise entirely out of ERCOT’s PUC-mandated publication of demand and capacity forecasts in its CDRs. *Id.* § 39.151(d-4)(1); *see also id.* § 39.151(d) (authorizing the PUC to make rules regarding electric reliability). The PUC requires ERCOT to publish reports regarding its operations and budget, 16 TEX. ADMIN.

CODE § 25.362(i), pursuant to the PUC’s “complete authority,” PURA § 39.151(d). The PUC has issued multiple regulations prescribing precisely what ERCOT must report and when. *See, e.g.*, 16 TEX. ADMIN. CODE §§ 25.362(i), 25.505. The CDR is one of the required reports. 16 TEX. ADMIN. CODE § 25.505. The purpose of the rule requiring the CDR is to ensure sufficient generation capacity on the grid. 16 TEX. ADMIN. CODE §§ 25.505(a), (c). The CDRs thus relate directly to PURA’s mandate of ensuring the adequacy and reliability of the ERCOT system.

**C. The PUC has exclusive jurisdiction over claims regarding ERCOT’s performance and operations.**

Panda has insisted that an express grant of exclusive jurisdiction is required. Both *Entergy* and *Southwestern Bell* hold to the contrary. Nevertheless, it is notable that the Legislature *twice* made clear that that the PUC, and no other entity, was to exercise authority over ERCOT.

First, ERCOT “is *directly responsible and accountable to* the” PUC. PURA § 39.151(d) (emphasis added). “Directly” “means ‘without the intervention of a medium or agent’ or ‘immediately.’” *Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 535–36 (Tex. 2016) (quoting BLACK’S LAW DICTIONARY 557 (10th ed. 2014)). “Directly” thus positions the PUC as ERCOT’s “immediate” overseer, with which no other entity (or litigants) can intervene. *See id.*

This is confirmed by PURA’s statement that the PUC

has *complete authority* to oversee and investigate [ERCOT's] *finances, budget, and operations* as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties.

PURA § 39.151(d) (emphasis added). “Complete” is “total.” *Complete*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 465 (2002). The Legislature thus intended that the PUC, to the exclusion of all others, control ERCOT's “finances, budget, and operations.” *Cf. Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011) (explaining that when “*complete* preemption” exists, it means that “Congress intended the federal cause of action to be the *exclusive* cause of action” (quotations omitted; emphasis added)).<sup>23</sup>

These provisions establish the PUC's absolute control over ERCOT, to the exclusion of other entities, forums, or litigants. That is why PURA extensively and specifically prescribes the manner in which the PUC oversees ERCOT. *Cf. Entergy*, 142 S.W.3d at 323 (“The Legislature's description of PURA as ‘comprehensive,’

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<sup>23</sup> In *Panda I*, *Panda*, citing *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 518 S.W.3d 422 (Tex. 2017), argued that when the Legislature said “complete authority,” it actually meant incomplete authority. See *Panda's* Consol. Br. 30–31, *Panda I*, No. 05-17-00872-CV (Tex. App.—Dallas filed Sept. 20, 2017). In *Forest Oil*, an oil company argued that the Railroad Commission had exclusive jurisdiction over a landowner's claim, pointing to statutes making the Commission “solely responsible” for problem underlying the claims. The Supreme Court held that there was no exclusive jurisdiction because the statutes were meant to resolve a specific inter-agency jurisdictional dispute by giving the Railroad Commission responsibility for the issue to the exclusion of the Texas Commission on Environmental Quality. *Id.* at 428–29. Here, by contrast, there is no inter-agency jurisdictional dispute. To the contrary, the Legislature specified that the PUC's “complete authority” was intended to “ensure [ERCOT's] accountability and . . . perform[ance].” PURA § 39.151(d).

coupled with the fact that PURA regulates even the particulars of a utility's operations and accounting, demonstrates the statute's pervasiveness.”). The PUC has total authority over ERCOT's spending and revenue, and it has numerous tools to ensure that ERCOT complies with PURA and PUC rules. It can (and does) require extensive self-reporting and may audit ERCOT at will. It is entitled to remedy noncompliance through administrative penalties and decertification.

**D. The Legislature has abrogated claims against ERCOT outside the administrative process.**

That the Legislature intended for the PUC to exercise total control over ERCOT—to the exclusion of any other forum—is clear. The PUC's complete authority over ERCOT includes specific statutory authority over its budget, revenues, operations, and reporting. The reports—the object of Panda's suit—are PUC-mandated. These facts establish the Legislature's intent to encompass concerns regarding ERCOT's operations within the administrative process.

Thus, the PUC is empowered to hear complaints about, or investigate on its own authority, ERCOT's alleged impropriety, and the PUC may provide remedies consistent with PURA's regulatory scheme. PURA § 39.151(d-4)(6); 16 TEX. ADMIN. CODE §22.251. It can also assess penalties, decertify ERCOT, or order other relief to improve ERCOT's performance. PURA § 39.151(d). What the Legislature did not authorize is the type of relief that Panda seeks: billion-dollar damages, paid to private litigants from a statutorily authorized fee, all of which threatens, rather

than strengthens, the Legislature’s “comprehensive” regulatory regime and the stability of the electric market.

This Court should respect the line the Legislature has drawn. That is the approach that the Supreme Court has repeatedly endorsed, deferring to the remedies the Legislature has adopted, and refusing to supplement them when the Legislature has occupied the field. The Court has focused on “the problem” underlying a complaint. Here, the alleged problem implicates core ERCOT operations, including its mandatory reporting, over which the PUC has exclusive control. What Panda seeks is incompatible with the regulatory regime, which carefully balances the need for ERCOT’s accountability with the need to maintain critical services. Finally, some or all Panda entities *can* bring their complaints to the PUC; what they cannot do is commandeer, for their private purposes, the remedial actions the Legislature has established.

**1. Regulatory regimes can abrogate non-administrative claims and remedies.**

“Whether a regulatory scheme is an *exclusive remedy* depends on whether ‘the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.’” *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008) (quoting *Sw. Bell*, 235 S.W.3d at 624–25). This is a form of preemption, a legislative mechanism that displaces common-law causes of action. *See, e.g., B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276,

285 (Tex. 2017) (considering whether the Texas Commission on Human Rights Act “preempt[ed] a common law assault claim” (citing *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 808 (Tex. 2010))); *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 653 (Tex. 2006) (explaining that Legislature passed a statute on covenants not to compete in order to “preempt[ the] common law”).

In determining whether a statutory scheme displaces a common-law claim, the Legislature’s intent is paramount. *See Reeder v. Daniel*, 61 S.W.3d 359, 364 (Tex. 2001) (refusing to “disturb the Legislature’s regulatory scheme by judicially recognizing a cause of action” apart from the comprehensive statutory scheme that the Legislature had created). Where the creation of a regulatory regime abrogates a “common-law right,” the Legislature’s intent must be apparent from the statute’s “express terms or necessary implications.” *Forest Oil*, 518 S.W.3d at 428 (quotations omitted). An intent to create an exclusive remedy can be implied from inconsistencies between the administrative scheme and the cause of action. *See Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 443 (Tex. 2012) (finding common-law and statutory bad faith claims barred by exclusive administrative remedy where it was “inconsistent with the structure and detailed processes” and “goals and legislative intent exhibited in” the regulatory scheme); *see also In re Crawford & Co.*, 458 S.W.3d 920, 924 (Tex. 2015) (explaining that *Ruttiger* found common-law remedies displaced by the administrative scheme “for the same reason” as statutory

remedies); *Waffle House*, 313 S.W.3d at 808 (explaining that a statutory remedy displaces a common-law one when the two are “irreconcilable and inconsistent” (citing *Lopez*, 259 S.W.3d at 154)).

**2. This case does not involve abrogation of any common-law right.**

Panda argues that exclusive PUC jurisdiction over ERCOT’s operations would deprive it of “a common-law right,” in violation of the Texas Constitution’s Open Courts provision. Panda’s concerns are misplaced. Its pleadings exclusively challenge actions ERCOT took pursuant to or as a consequence of regulatory duties assigned to it by the Legislature and the PUC. Thus, the rights it asserts arise not from the common law, but from the administrative scheme.

It is not enough for Panda to allude to the “common law” in its pleadings, which do not control the exclusive jurisdiction analysis. *Crawford*, 458 S.W.3d at 926 (“Whether the Act provides the exclusive process and remedies, therefore, does not depend on the label of the cause of action asserted. . . . [C]laimants may not recast claims to avoid statutory requirements . . .”). Rather, the court “look[s] at the substance of the claim” to determine the nature of the right that the plaintiff alleges was violated. *Id.* When that right does not arise from the common law, the administrative regime may preclude a common-law—and even a constitutional—claim.

In *Subaru*, for instance, a car dealer alleged that Subaru had violated the Motor Vehicle Commission Code, which prohibits manufacturers from “unreasonably denying a dealership-relocation application.” 84 S.W.3d at 217. The dealer brought breach of contract and common-law duty of good faith and fair dealing claims. *See id.* at 217–18. The Supreme Court held that the Motor Vehicle Board had exclusive jurisdiction over the dealer’s claims. The Court rejected the dealer’s Open Courts argument because the dealer’s rights regarding “who may operate a dealership and where that dealership may be located” were creations of the regulatory regime, not of the common law. *Id.* at 227.

*Thomas* concerned a sheriff deputy’s suit for unjust termination. *See* 207 S.W.3d at 336–37. The sheriff’s department had created a civil service commission, pursuant to statutory authority. As part of the regulatory regime that created the commission, the deputy had won the right not to be terminated except for cause. *See id.* at 341–42. Thus the right forming the basis for the deputy’s suit arose from the regulatory regime, not from the common law, and the Supreme Court held that the commission therefore had exclusive jurisdiction. *Id.* (“We hold that once the employees of a department elect to create a commission, and the commission’s rules create rights employees would not have at common law, the commission obtains exclusive jurisdiction over those matters.”).

In *Marquez*, the Commissioner of Education had exclusive jurisdiction over matters pertaining to the “school laws of this state.” 487 S.W.3d at 546–47. The plaintiffs brought constitutional claims that they contended fell outside of the Commissioner’s jurisdiction. *See id.* The Supreme Court rejected that argument because the actions that formed the basis for the constitutional claims were alleged violations of “the school laws of this state.” *Id.* at 548. Therefore, the underlying rights the plaintiffs asserted arose not from the constitution or common law, but from the regulatory regime. *Id.* at 549. Exclusive jurisdiction lay with the Commissioner. *Id.*

The Austin Court of Appeals reached a similar holding in *Texas Mutual Insurance Co. v. Eckerd Corp.*, 162 S.W.3d 261 (Tex. App.—Austin 2005, pet. denied). There, Texas Mutual asserted common-law claims, including a negligent-misrepresentation claim, against several pharmacies related to alleged overcharges for drugs Texas Mutual provided to injured workers under the Workers’ Compensation Act. *See id.* at 262–63. The pharmacies argued that the Workforce Commission had exclusive jurisdiction. *See id.* at 266. Texas Mutual objected on the grounds that the Legislature had not intended to abrogate its common-law claims. *See id.* The court rejected this objection, explaining “that Texas Mutual’s claims are ‘common law’ in name only.” *Id.* It held that Texas Mutual’s claims “derive[d] from the statutory provision setting the maximum allowable reimbursement,” explaining

that “[a]t common law, there is no standard or duty to charge a particular amount for prescription drugs.” *Id.* Accordingly, the court held that the abrogation of Texas Mutual’s claims was permissible. *Id.*; accord *Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001) (“The court could not adjudicate her damages claim without determining her entitlement to medical treatment, a matter within the Commission’s exclusive jurisdiction.”).<sup>24</sup>

The Supreme Court and intermediate courts have thus made clear that where a plaintiff’s complaint concerns violations of, or implicates rights arising from, a regulatory regime, no common-law *right* is abrogated even if a common-law *claim* is presented.

Here, Panda’s claims arise out of complaints about the reliability of reports that the PUC specifically directed ERCOT to publish. Panda thereby challenges ERCOT’s performance of duties the PUC mandates. Its claims are directly traceable to PURA’s requirement that ERCOT “ensure the reliability and adequacy of the regional electrical network.” PURA § 39.151(a)(2). These duties are creatures of rule and statute, not the common law. No one, including Panda, has a common-law

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<sup>24</sup> See also *Vista Med. Ctr. Hosp. v. Texas Mut. Ins. Co.*, 416 S.W.3d 11, 31–40 (Tex. App.—Austin 2013, no pet.) (finding no violation of common-law right where the plaintiffs “s[ought] redress for alleged injury that derives from the workers’ compensation act”); *Creedmoor-Maha Water Supply Corp. v. Texas Comm’n on Env’tl Quality*, 307 S.W.3d 505, 524–25 (Tex. App.—Austin 2010, no pet.) (rejecting open-courts challenge where plaintiff’s trespass claim was premised on rights that were “entirely a function of statute”).

right to perfect projections of future electricity demands. And no court could award Panda damages without accounting for—or impermissibly ignoring—matters within the PUC’s exclusive jurisdiction, namely ERCOT’s operations and expenditures, as well as the System Administration Fee. *See Fodge*, 63 F.3d at 804; *Eckerd*, 162 S.W.3d at 266. Under the cases described above, the PUC—not the courts—properly oversees ERCOT’s PUC-driven obligations.

Panda has creatively pleaded statutory violations as common-law claims. The Supreme Court has denounced that practice. There is no open-courts violation.

### **3. Allowing Panda’s claims against ERCOT would destroy PURA’s regulatory scheme.**

Even if Panda had a common-law right that was implicated by this case, permitting its pursuit in court would cripple the regulatory scheme. That result would constitute a “clear repugnance between” Panda’s common law claims and PURA’s regulatory regime. *Cash Am.*, 35 S.W.3d at 16 (quotations omitted). This repugnance reflects the Legislature’s intent to abrogate common-law claims against ERCOT related to the performance of its duties. *Id.*

PURA balances competing concerns, among them the need for ERCOT’s provision of a reliable electric grid and the need for ERCOT to act legally and appropriately. ERCOT is not merely a regulated entity, but is itself a *regulator*. *See FPL Energy Upton Wind I, L.P. v. City of Austin*, 240 S.W.3d 456, 457 (Tex. App.—Amarillo 2007, no pet.) (explaining that ERCOT “regulate[s] and manage[s]” the

electric grid). Because of this unique role in PURA's regulatory system, permitting ERCOT to be hauled into court on claims outside the administrative process presents a unique harm to the entire system.

Given ERCOT's vital role in facilitating a functioning electric grid, PURA granted the PUC total authority to oversee ERCOT and, where necessary, punish it. But disciplining ERCOT with a devastating financial sanction would sacrifice the continuity of ERCOT's operations. For that reason, PURA carefully prescribes the circumstances under which the PUC can decertify ERCOT, so that the core oversight function never ceases. ERCOT's liabilities and costs are funded through a state-authorized fee that the Legislature says must be "reasonable and competitively neutral." PURA § 39.151(e). Protecting ERCOT from significant and sudden liabilities that could halt operations entirely, while permitting proportionate administrative penalties, protects the grid, market participants, and consumers. In this way, the PUC balances the need to keep ERCOT accountable while simultaneously maintaining a functional electric grid.

Allowing common-law damage claims against ERCOT outside the administrative process would destroy all of this. Panda seeks to recover from ERCOT more than \$2.7 billion, an amount it says increases quarterly. CR14:4972–73. ERCOT's annual budget is less than one-tenth that amount. The fact that a single

verdict adopting Panda's damage model could cripple grid oversight underscores why jurisdiction rests solely with the PUC.<sup>25</sup>

PURA gives the PUC complete control over ERCOT's budget, so ERCOT's ability to satisfy a judgment of this magnitude would ultimately require PUC consent.<sup>26</sup> This discretionary PUC power to decide whether a substantial claim against ERCOT should be paid is insulated from judicial review by the PUC's sovereign immunity. This practical power of the purse is further evidence of the PUC's exclusive jurisdiction over issues regarding ERCOT's performance.

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<sup>25</sup> In the trial court, Panda placed much rhetorical weight on the fact that ERCOT carries insurance, asserting that *the PUC's*—not the Legislature's—approval of this coverage implied that ERCOT was subject to non-administrative claims regarding its operations. Even ERCOT's aggregate coverage, were it all applicable to Panda's claims, would cover only a fraction of Panda's alleged damages. And on its merits, Panda's argument makes little sense. The Supreme Court long ago recognized that an immune entity's insurance coverage does not imply a waiver of immunity; generally, the insurance is purchased to pay claims falling outside that immunity, such as *ultra vires* or Tort Claims Act claims, as well as attorneys' fees. *See Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980). Likewise, ERCOT has never argued that every conceivable claim against it would be within the PUC's exclusive jurisdiction; for instance, an invitee's slip and fall may not be. That ERCOT may be amenable to certain suits, and carries insurance to cover them, does not imply that *no* suit against it is in the PUC's exclusive jurisdiction.

<sup>26</sup> Panda has argued that ERCOT could pay for the judgment without PUC approval by raising its membership dues. First, this change could not be made without the PUC's consent. Member dues are set by ERCOT's bylaws, and PUC permission would therefore be necessary to change them. PURA § 39.151(g) (granting the PUC authority over ERCOT's bylaws, which “must reflect the input of the [PUC]”). In any event, raising these fees to pay Panda's damages would constitute a massive change to ERCOT's fee regime. Currently, dues are \$50 to \$2000 per member per year. ERCOT Bylaws § 3.4, <https://goo.gl/bseouH>. In 2016, these dues accounted for about \$280,000—or about 0.1%—of ERCOT's budget. *See* PUC Docket No. 38533, Item No. 29 at 63 (ERCOT's 2018/2019 budget submission). Panda claims damages of more than \$2.7 *billion*—or approximately 10,000 times the revenue ERCOT's member dues currently generate.

If ERCOT failed to pay, Panda's remedy would be to execute against ERCOT's property. But execution against ERCOT's real and personal property would leave ERCOT functionally unable to perform its statutorily mandated duties. Suddenly, Texas could be left without an independent system operator to ensure grid reliability—without the PUC having gone through the process PURA requires to ensure that a successor is ready to take over. The alternative to execution would likely be bankruptcy, which would also starve ERCOT of the ability to adequately perform its functions, without giving the PUC the time it would need to find a replacement.

Things would be no less complicated if the PUC permitted payment of the judgment. ERCOT is funded by a statutory fee, authorized under the State's police power. *See Lowenberg v. City of Dallas*, 261 S.W.3d 54, 58 (Tex. 2008) (explaining that the government may charge fees to recoup "regulatory cost[s]"); *see also TracFone Wireless, Inc. v. Comm'n on State Emergency Commc'ns*, 397 S.W.3d 173, 175 n.3 (Tex. 2013) ("A charge is a fee rather than a tax when the primary purpose of the fee is to support a regulatory regime governing those who pay."); *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 461 (Tex. 1997) (explaining that it is the State's regulatory police power that allows it to impose fees of this sort). Because a judgment against ERCOT would be paid out of a fee collected pursuant to the State's authority, it would in a very real sense be a judgment against

the State itself. *See Panda I*, 552 S.W.3d at 315 (holding that the fee is “authorized by statute, set by the PUC, collected pursuant to the State’s power, and intended to further a function for the benefit of the public”).

Moreover, PURA mandates that the system administration fee be “reasonable and competitively neutral.” PURA § 39.151(e). A proposed increase in the fee must account for the effect it would have “on market participants and consumers.” *Id.*<sup>27</sup> If the fee had to be increased to pay for judgments exogenous to the regulatory process, over which the PUC lacked control, the PUC would have no power to consider these important statutory concerns in setting the fee. Moreover, the sheer amount of potential liability would have serious consequences for market participants and consumers. Panda’s alleged damages are more than ten times ERCOT’s annual revenues.<sup>28</sup> Paying them would require a transformative increase in the fee. This would compromise the PUC’s and ERCOT’s ability to ensure that the fee is “reasonable and competitively neutral.” Indeed, during the 2015 budget-review process, some market participants balked at the 20% increase in the System

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<sup>27</sup> Because the fee is ultimately paid by Texas electricity consumers, *see* SUNSET ADVISORY COMMISSION, FINAL REPORT: PUBLIC UTILITY COMMISSION, ELECTRIC RELIABILITY COUNCIL OF TEXAS, & PUBLIC UTILITY COUNSEL 48 (July 2011), a judgment financed through a fee increase would also fall on these consumers.

<sup>28</sup> *See id.*

Administration Fee that the PUC approved.<sup>29</sup> Paying for Panda’s damages would require a 1,000% increase in the Fee. And this is just one lawsuit. Opening the floodgates to others would further strain the administrative system.

In sum, a judgment against ERCOT would inflict grave harm on PURA’s regulatory scheme. Either it would commandeer the PUC’s control over ERCOT’s budget, operations, and revenue, taking the System Administration Fee outside of the PUC’s control and the statutory criteria; or it would place ERCOT in the untenable position of being unable to pay a judgment the PUC refused to authorize, leaving Texas’s electrical grid at the mercy of potential execution proceedings, rather than the statutory procedure. And in both cases, the State’s sovereign immunity would be implicated.

This severe incompatibility between PURA’s regulatory scheme and the possibility of non-administrative claims against ERCOT shows the Legislature’s clear intent to make the administrative regime the exclusive remedy for resolving problems with ERCOT’s operations. *Forest Oil*, 518 S.W.3d at 428 (requiring that the “statute’s express terms or necessary implications . . . indicate clearly the Legislature’s intent to abrogate common-law rights”).

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<sup>29</sup> See Tex. Pub. Util. Comm’n, *Review of ERCOT Budget*, Docket No. 38533, Item No. 28 at 7 (order approving 20% increase in System Administration Fee, from \$0.465/MWh to \$0.555/MWh) (Oct. 14, 2015); *PUC Review*, Item No. 27 at 3–4 (memorandum regarding October 8, 2015, open meeting) (describing public comment on proposed fee increase).

**E. Panda’s claims are best suited for the PUC.**

**1. The PUC is empowered to hear Panda’s claims.**

Though it may not be awarded the billion-dollar bounty it seeks, Panda could bring its complaints directly to the PUC. Doing so would be in line with the types of discipline the Legislature envisioned with respect to ERCOT. Due to the grid’s importance to Texas—and ERCOT’s importance to the grid—the PUC’s primary remedial mechanisms focus on fixing problems with ERCOT’s practices and protocols. PURA § 39.151(d). But the Legislature also provided for more serious penalties when circumstances warrant: administrative penalties and decertification. *Id.* Panda’s lawsuit improperly attempts to expand the scope of penalties for ERCOT’s alleged misdeeds beyond the bounds the Legislature set. *See Ruttiger*, 381 S.W.3d at 445 (holding that workers’ compensation act precluded plaintiff’s Insurance Code claims because, among other things, it provided for administrative penalties against insurer). More important, Panda’s lawsuit attempts to take control for this discipline from the PUC and assign it to the courts.

But Panda could bring its complaints about ERCOT to the PUC, which would address—far more efficiently than the damages it seeks—any concerns over whether “ERCOT [is] providing accurate information.” Panda Br. 12.

First, the PUC is empowered to “resolve disputes between an affected person and [ERCOT] and adopt procedures for the efficient resolution of such disputes.”

PURA § 39.151(d-4)(6). As it relates to Panda, the definition of “affected person” includes “a person whose utility service or rates are affected by a proceeding before a regulatory authority.” *Id.* § 11.003(1)(B). Utility transmission rates in ERCOT are determined annually by the PUC in a contested proceeding.<sup>30</sup> To the extent Panda consumes electricity in the ERCOT region,<sup>31</sup> then, it would be an “affected person” under PURA.

The PUC may also hear claims against ERCOT pursuant to a longstanding rule permitting “[a]ny affected *entity*”—as opposed to the statutorily defined “affected persons”—to file complaints about ERCOT’s performance and operations. 16 TEX. ADMIN. CODE § 22.251(b). Under this provision, the PUC has consistently permitted power generators, like Panda, to seek administrative relief concerning ERCOT’s actions.<sup>32</sup>

Importantly, Rule 22.251 *predates* the provision confirming the PUC’s authority to hear claims by “affected persons.” PURA § 39.151(d-4)(6). Rule 22.251(b) was adopted in 2003, and the PUC intentionally chose to use the term

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<sup>30</sup> *E.g.* Tex. Pub. Util. Comm’n, *Commission Staff’s Application to Set 2017 Wholesale Transmission Service Charges for the Electric Reliability Council of Texas*, Docket No. 46604 (March 20, 2017) (final order).

<sup>31</sup> Many Panda entities allege that they are “located in” Texas, CR3:1159–61, and no Plaintiff has alleged or shown that it is not a rate-payer.

<sup>32</sup> *E.g.*, Tex. Pub. Util. Comm’n, *Odessa-Ector Power Partners, L.P.’s Appeal and Complaint of ERCOT’s Denial of Settlement Disputes*, Docket No. 41790 (Aug. 26, 2013) (power generator’s complaint seeking compensation for losses allegedly caused by ERCOT’s actions).

“entity,” rather than the defined “affected persons,” to ensure that anyone “harmed by ERCOT actions ha[s] recourse to the commission for relief”:

Foreclosing an interested person from challenging an ERCOT action before the commission is likely to result in challenges in other forums, *such as the courts, that are less well equipped to resolve them.*

28 Tex. Reg. 2489, 2490 (2003) (emphasis added). The PUC concluded that it had authority to adopt this rule based upon “PURA § 39.151, which grants the commission authority to establish the terms and conditions for the exercise of ERCOT’s authority.” Tex. Reg. 9521, 9522 (2002); *see also* PURA § 14.052(a) (granting the PUC authority to establish “rules governing practice and procedure before the commission”). ‘

Panda suggests that Rule 22.251(b) was implicitly repealed by the enactment of the “affected person” provision in 2004. But S.B. 408, which added that provision, was intended to “*strengthen* the [PUC’s] oversight of [ERCOT]” at the Sunset Commission’s recommendation. Senate Research Center, B.A., S.B. 408, 79th Leg., R.S. (emphasis added); 2004 Sunset Commission Report at 1–2. S.B. 408 thus substantially *expanded* State oversight of ERCOT, including by adding the “complete authority” and “directly responsible and accountable to” language, restructuring ERCOT’s board, and making ERCOT subject to open-meetings and conflict-of-interest laws. Act of May 30, 2005, 79th Leg., R.S. ch. 797, § 9–10, 2005 Tex. Gen. Laws 2728, 2729–32. Nothing in this amplification of the PUC’s authority

over ERCOT suggested an intent to displace Rule 22.251(b), which has never been challenged—including in this case—let alone invalidated. *See* 35 Tex. Reg. 10213, 10217 (2010) (noting that Rule 22.251 “protect[s] the rights of individual market participants vis-à-vis ERCOT” by allowing “any affected entity [to] obtain relief from the [PUC] for improper conduct”). To the contrary, S.B. 408’s bolstering of the PUC’s plenary authority over ERCOT only confirms that the PUC is the correct forum to resolve disputes regarding ERCOT’s operations.

Indeed, declaring Rule 22.251(b) void—relief Panda has never sought—would substantially impede the efficacy of the PUC’s oversight role. Section 11.003(a) was drafted long before deregulation, and its definitions relate to the former regulated-utility framework. Essentially *none* of the market participants directly affected by ERCOT’s work come within the definition of “affected persons”: neither power generators, retail electric providers, qualified scheduling entities, nor any of the other entities financially impacted by ERCOT decisions. Under Panda’s narrow reading, the *only* relevant entities that would be covered by the definition would be transmission and distribution utilities—which are unique in that they have no financial role in the ERCOT wholesale market and therefore have much less reason to challenge an ERCOT decision. The Legislature cannot have intended to divest the PUC of jurisdiction over the complaints of every entity financially impacted by ERCOT regulation, even as it professed to be *expanding* the

scope of the PUC's oversight powers. Rather, section 39.141(d-4)(6) is best understood as a confirmation of the PUC's powers, not a restriction on them.

Section 22.251(b) is a valid rule enacted pursuant to the PUC's vast authority over ERCOT. It authorizes Panda to bring to the PUC its complaints about ERCOT's execution of its governmental functions. If the PUC sustains those complaints, it may penalize, decertify, or otherwise discipline ERCOT. This rule is in harmony with the PUC's exclusive jurisdiction and preserves the separation of powers the Legislature envisioned.<sup>33</sup>

**2. Even if the Legislature excluded claims against Panda from the PUC's purview, that would be a valid Legislative decision.**

For complaints properly brought to the PUC, PUC staff is available to represent the public interest, ensuring that PURA's systemic goals are protected during any proceeding. *See* 16 TEX. ADMIN. CODE § 22.251(g). If the PUC determines that a complaint against ERCOT is meritorious, it can order "corrective action," including the suspension of improper activity or a modification of ERCOT's protocols. *Id.* § 22.251(o). But consistent with PURA's recognition of ERCOT's

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<sup>33</sup> In *Panda I*, Panda argued that because Rule 22.251 provides for a shortened limitations period, it would deprive Panda of due process. But Panda has not shown that the abbreviated period "makes it impossible for [Panda] to enforce [its] rights." *Gutierrez v. Lee*, 812 S.W.2d 388, 393 (Tex. App.—Austin 1991, writ denied) (concluding that three-month limitations period did not violate open-courts guarantee). Nor could it: the Rule allows extension of the period "upon a showing of good cause, including . . . the complainant's failure to timely discover through reasonable efforts the injury giving rise to the complaint." 16 TEX. ADMIN. CODE § 22.251(d).

importance to the utility market, and the fact that ratepayers ultimately bear ERCOT's costs, these remedies focus on ensuring ERCOT's compliance and adequate performance, not on awarding private relief that would disrupt the regulatory scheme.

The Legislature did not intend for complaints by entities like Panda, alleging billions in damages, to be considered without the benefit of PUC staff or the PUC's ability to impose "corrective action." If "affected persons" is as narrow as Panda contends, that was the Legislature's deliberate choice regarding who had standing to complain about ERCOT action. Thus, the Legislature's limitation on who may complain to the PUC does not suggest that the PUC's jurisdiction is non-exclusive, but instead enhances ERCOT's argument that the Legislature has completely displaced Panda's claims.

\* \* \*

The Legislature established a comprehensive regime in which ERCOT regulates important aspects of the electric system in Texas. The Legislature explicitly gave the PUC plenary power to oversee ERCOT's budget and operations. Everything that ERCOT does—including the conduct Panda challenges—is in furtherance of legislative and PUC mandates. The PUC has explicit authority to remedy the problem at the heart of Panda's suit. To permit enormous damages claims against ERCOT in court would threaten the regulatory regime and substantially

interfere with PUC prerogatives. The PUC therefore has exclusive jurisdiction over any claims against ERCOT regarding its performance.

### **CONCLUSION AND PRAYER**

This case's outcome is determined first by the law-of-the-case doctrine. And ERCOT's two jurisdictional arguments—exclusive jurisdiction and sovereign immunity—serve the same purpose: to preserve the Legislature's choices about what entity should administer the regulatory scheme of which ERCOT is an integral part. Should this Court reach the merits, both provide a firm basis for dismissing Panda's claims against ERCOT, and Panda is not entitled to replead. This Court should affirm the trial court's judgment.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

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